Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ANGEL DIAZ, *et al.*,

Appellees,

vs.

SHELDON SILVER, in his official capacity as Speaker of the House for the Assembly of the State of New York, *et al.*,

Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF IN OPPOSITION TO APPELLEES' MOTION TO AFFIRM

C. DANIEL CHILL
Counsel of Record
GRAUBARD MOLLEN & MILLER
Attorneys for Appellant
Sheldon Silver
600 Third Avenue
New York, New York 10016
(212) 818-8800

Of Counsel:
STEVEN MALLIS
ELAINE M. REICH
JACQUELINE S. RIBNICK

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The facts germane to appellees' Motion to Affirm (hereinafter "Motion") are fully set forth in appellant Sheldon Silver's Jurisdictional Statement (hereinafter "Silver Jurisd. St."). As shown therein, the critical issue in appellees' race-based constitutional challenge to New York State's legislatively enacted districting plan is whether "race was the predominant factor motivating the legislature's decision. . . ." *Miller v. Johnson*, 115 S. Ct. 2475, 2488 (1995); *see* cases cited at Silver Jurisd. St., pp. 6-7.

While not disagreeing that this is the test (*cf.*, Motion, p. 20), appellees' principal argument in support of their Motion is that the New York State legislature's motivation is to be determined (solely, simplistically and presumptively) on the basis of the districting plan's supposed racial effects. Ignoring this Court's jurisprudence demanding that a sensitive and searching factual inquiry be conducted when assessing a legislature's districting motivation, and relying instead on inapposite cases dealing with rules of statutory construction, appellees argue:

> The "intent" or "purpose" of legislation is always determined in the first instance by its facially evident content. . . . For example, a bill that authorizes highway construction is "intended" to authorize highway construction, and a bill that bans narcotics is "intended" to ban narcotics.
>
> In the same way, where districts are distorted in a manner that carefully includes and excludes members of particular races, they clearly were *intended* to perform this function. As with any other bill, the intent of a redistricting bill may be inferred from its contents.

(Motion, p. 19) (emphasis in original).

Having determined that legislative motivation is strictly a matter of construing a districting bill's content, appellees conclude with respect to the districting plan here at issue:

> Given the bill's content, all of Silver's arguments concerning the political circumstances surrounding the districting bill's passage are irrelevant.

(Motion, p. 20). Since the "content" of districting plans, including the one challenged here, typically make no reference to race, on their face they are racially neutral. By referring to the content of New York's districting legislation appellees obviously are alluding to the racial effects of the shape of the districting lines as enacted.

Appellees thus employ an "effects" test, as did the District Court, to determine legislative motivation. In so doing, appellees brush aside as "irrelevant" the complex procedural history and non-racial political considerations that culminated in the New York State legislature's decision to enact a districting plan. Appellees' "effects" approach to legislative motivation is completely at odds with and does violence to this Court's carefully considered pronouncements regarding (1) the sensitive and searching factual inquiry which must accompany a federal court's consideration of a state legislature's motivation in enacting a districting plan and (2) the fact that while the racial impact of a districting plan may be some evidence of a legislature's motivation in enacting a plan, it is in no way determinative of the legislature's dominant motivation. Appellees err, as did the District Court, in both respects.

I. A Federal Court's Review of a State Legislature's Districting Process Demands a Sensitive and Searching Factual Inquiry

In *Miller v. Johnson*, *supra*, this Court spoke generally of the careful inquiry that must be conducted when a federal court intrudes into the districting process, a sensitive area that is primarily the duty and responsibility of the states:

> Federal Court review of districting legislation represents a serious intrusion on the most vital of local functions. It is well settled that "reapportionment is primarily the duty and responsibility of the State."

115 S. Ct. at 2488.

The judicial inquiry that must be conducted into the districting process is all the more intricate and demanding when the issue under scrutiny is a legislature's alleged racial motivation. As stated in *Miller v. Johnson*:

> The courts, in assessing the sufficiency of a challenge to a districting plan, must be sensitive to the complex interplay of forces that enter a legislature's redistricting calculus. *Redistricting legislatures will,*

> *for example, almost always be aware of racial demographics; but it does not follow that race predominates in the districting process.* . . . The distinction between being aware of racial considerations and being motivated by them may be difficult to make. This evidentiary difficulty, together with the sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments, requires courts to exercise extraordinary caution in adjudicating claims that a state has drawn district lines on the basis of race.

Id. (citations omitted)(emphasis added).

Miller v. Johnson's requirement for a searching and sensitive judicial inquiry into alleged invidious racial motivation by a state legislative body is not new. In the seminal case of *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977), this Court similarly stated:

> Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action -- whether it "bears more heavily on one race than another," -- may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. The evidentiary inquiry is then relatively easy. But such cases are rare. Absent [such] a pattern *. . . impact alone is not determinative, and the Court must look to other evidence.*

Id. at 266 (footnotes and citations omitted)(emphasis added).

In *Arlington Heights* the Court went on to specify the nature of the evidence germane to a judicial inquiry into whether a legislature was motivated by invidious racial discrimination, namely, "[t]he historical background of the decision," "[t]he

specific sequence of events leading up to the challenged decision," and "[t]he legislative or administrative history," including "contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports." *Id.* at 267-68.

Here, appellees ignore, as did the District Court, this Court's pronouncements mandating that there be a searching and sensitive inquiry into the circumstances surrounding the New York State legislature's enactment of the districting plan embodied in the *Reid* court's judgment. Were such an inquiry to be conducted, it would reveal that traditional, non-racial districting factors were the predominant and overriding considerations motivating the legislature's enactment of the plan here challenged by appellees (*see* Silver Jurisd. St., pp. 7-12). Those factors included primarily incumbency protection, as sworn to by the leadership of both chambers of the legislature, and as corroborated by contemporaneous newspaper reports of the events in question (*see* Silver Jurisd. St., pp. 9-12).

Appellees brazenly argue that all such "political considerations" are "irrelevant" (Motion, p. 20). As *Miller v. Johnson*, and *Arlington Heights* make clear, however, appellees are dead wrong. Political considerations are patently relevant to a judicial inquiry regarding legislative motivation. *See generally Bush v. Vera*, 116 S. Ct. 1941, 1952 (1996).

II. Racial Impact Is Not Determinative of Invidious Legislative Motivation

As indicated above, appellees see no need to look beyond the content of the districting plan itself to find conclusive evidence of allegedly invidious legislative discrimination in view of the districting plan's supposed racial impact. While impact may be evidence of a discriminatory purpose, this Court has made clear that it is by no means determinative.

As shown above, in *Arlington Heights* this Court held that discriminatory impact is only the "starting point" for analysis, not the end point posited by appellees. Indeed, in *Arlington Heights*, the Court of Appeals had made a specific finding

that "the village's decision carried a discriminatory 'ultimate effect'." 429 U.S. at 271. Notwithstanding such racial impact, the Supreme Court held that the Court of Appeals' finding of adverse discriminatory effects was "without independent constitutional significance" since plaintiffs had failed to sustain their burden of proving a discriminatory legislative purpose. *Id.* Impact clearly is not determinative of motive.

By focusing on impact rather than legislative motivation, appellees turn the constitutional problem on its head. The relevant question is whether New York State's legislature was motivated by a dominant, racially discriminatory motive in enacting the *Reid* court plan, not whether the plan as enacted is as "good," or as race-neutral, a plan as a federal court might have drawn. As *Arlington Heights*, *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1970) and *Miller v. Johnson* make crystal clear, it is the legislature's motivation that is at the heart of the constitutional inquiry, not the discriminatory effects of legislative action. Indeed, were it otherwise, the searching and sensitive inquiry into legislative motive demanded by this Court would not be at all necessary. The legislative plan, as enacted, would simply be judicially reviewed for its content to see if it were sufficiently race-neutral in its impact. Legislative motive under such circumstances would be irrelevant. The law, as stated again and again by this Court, unequivocally is otherwise (*see* cases cited at Silver Jurisd. St., pp. 6-7).

Appellees attempt to bootstrap their legislative motivation argument with the discredited premise that a legislature's knowledge of the discriminatory effects of its action supplies the requisite invidious motive (Motion, p. 19). This motive as "volition" or "awareness" theory has previously been debunked by this Court. As stated in *Miller v. Johnson*, *supra*, while "[r]edistricting legislatures will . . . almost always be aware of racial demographics [,] . . . it does not follow that race predominates in the districting process." 115 S. Ct. at 2488. "'Discriminatory purpose,' . . . implies more than intent as volition or intent as awareness of consequences." *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. at 279

(1979). "('"[D]iscriminatory purpose" . . . implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects')." *Miller v. Johnson*, 115 S. Ct. at 2488 (quoting *Personnel Adm'r of Mass. v. Feeney*, *supra*).

Appellees' effects-based approach to motive would lead to precisely what this Court has labored mightily to avoid -- thrusting federal district courts into the political thicket of drawing district lines based *not* upon (a) a sensitive and searching factual inquiry into a state legislature's motivation for acting or (b) an ensuing finding that the state legislature was motivated primarily by race, but based instead on a subjective determination that a legislatively enacted plan has too much racial impact. Such a standard affords no constitutional predicate for federal courts to intrude upon a quintessentially political process to which the states, as this Court repeatedly has held, are entitled to appropriate deference (*see* cases cited at Silver Jurisd. St., p. 25). That, however, is exactly the consequence of the effects-based approach adopted by the District Court and urged by appellees in their instant Motion. This Court has not countenanced such an approach in the past and it should not condone its use by the District Court here.

III. The Issue of the New York State Legislature's Alleged Racial Motivation Is Not Properly the Subject of Summary Disposition

Given the sensitive and searching factual inquiry that courts must conduct in assessing the issue of a legislature's racial motivation, it was particularly inappropriate for the district court to have disposed of that issue on a motion for summary judgment, particularly in the face of sworn statements by the legislature's leadership directly addressing the legislature's non-racial motives for enacting the *Reid* plan (*see* Silver Jurisd. St., pp. 9-12).

We have pointed out generally that issues of subjective intent or motivation rarely lend themselves to summary disposition (Silver Jurisd. St., p. 22). Summary disposition is particularly inappropriate where, as here, a court must ferret

out a legislative body's primary motivation amidst what typically is a complex of motivational factors in enacting a districting plan. As stated in *Arlington Heights*:

> Rarely can it be said that a legislative or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one.

429 U.S. at 265 (footnote omitted). Further:

> "The search for legislative purpose is often elusive enough without a requirement that primacy be ascertained. Legislation is frequently multipurposed. . . ."

Id. at 265 n.11 (citation omitted)(quoting *McGinnis v. Royster*, 410 U.S. 263, 276-277 [1973]).

The issue of ascertaining whether a legislature's primary motive for acting was racial is especially difficult in the districting context, wherein legislatures will "almost always be aware of racial demographics." *Miller v. Johnson*, *supra*, 115 S. Ct. at 2488. As further elucidated in *Miller v. Johnson*:

> The distinction between being aware of racial considerations and being motivated by them may be difficult to make. This *evidentiary difficulty*, together with the *sensitive nature of redistricting* and the *presumption of good faith* that must be accorded legislative enactments, *requires courts to exercise extraordinary caution* in adjudicating claims that a state has drawn district lines on the basis of race.

Id. (emphasis added).

This Court's admonition that "extraordinary caution" be exercised by courts "in adjudicating claims that a state has drawn district lines on the basis of race," coupled with the "evidentiary difficulty" courts face in distinguishing between a legislature's awareness of race and being motivated to act

because of it, made it improper for the district court to have disposed of these issues on a motion for summary judgment. As we have noted (Silver Jurisd. St., p. 22), following *Shaw v. Reno*, 509 U.S. 630 (1993), no district court until now has declared district lines unconstitutional without a hearing or trial. The appropriate procedure for resolving the issue of the New York State legislature's alleged racial motivation required a trial. *See*, for example, the searching factual inquiry reflected in the plurality opinion in *Bush v. Vera*, 116 S. Ct. 1941 (1996).

Here, summary judgment was all the more inappropriate in view of the sworn submissions of Ralph Marino, the New York State Senate Majority Leader, and Benjamin Chevat, the Chief Counsel to the Speaker of the New York State Assembly, that the legislature enacted the *Reid* judgment to protect New York's Congressional delegation from implementation of the *PRLDEF* court's incumbent-unfriendly districting plan. Race was not the reason for the enactment (Silver Jurisd. St., pp. 9-10).

Appellees attempt to counter this evidentiary showing by pointing to the absence of any evidence that in crafting the 12th Congressional District racial considerations were subordinated to incumbency (Motion, pp. 20-21). There was no evidentiary showing below, however, that the New York State legislature focused specifically on the 12th Congressional District, or any other district, in enacting the state court's plan. There was evidence to show, on the other hand, that the state court's plan, including the 12th Congressional District, was enacted in its entirety by the legislature motivated primarily by considerations of incumbency protection, not race (*see* Silver Jurisd. St., pp. 7-12).

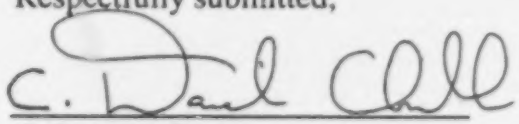
In short, the legislature adopted a full 31-district plan for incumbency protection purposes. It never focused on the 12th Congressional District as such. In the face of such compelling

evidence the District Court erred in granting summary judgment declaring the district unconstitutional.[1]

CONCLUSION

In view of the foregoing, appellees' motion should be denied, and the judgment of the District Court should be reversed and the case remanded to the District Court for a full trial with respect to the legislature's motivation in enacting the Congressional districting plan at issue in this case.

Respectfully submitted,



C. DANIEL CHILL
Counsel of Record
GRAUBARD MOLLEN & MILLER
Attorneys for Appellant
Sheldon Silver
600 Third Avenue
New York, New York 10016
(212) 818-8800

Of Counsel:
STEVEN MALLIS
ELAINE M. REICH
JACQUELINE S. RIBNICK

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[1] Appellees argue they are not personally bound by the *Reid* court judgment because they are not in privity with any party to that action and no class was ever certified (Motion, pp. 24-26). Under New York law, however, *de facto* class actions, such as the *Reid* action in which jointly held constitutional rights were adjudicated, do have *res judicata* effect notwithstanding the absence of formal class certification (*see* Silver Jurisd. St., p. 26), *Ferris v. Cuevas*, No. 96-9406 (2d Cir. July 3, 1997) (concurring opinion of Judge Kearse at p. 4560).